Office-Supreme Court, U.S.
FILED
APR 30 1965
JOHN F. DAVIS, CLERK

LIBRARY

IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted] 99

ERNEST A. HENRIQUES,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California for the Second Appellate District.

BERT B. RAND,
1730 K Street, N.W.,
Washington, D.C. 20006,
and
BERTRAM H. ROSS,
453 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions below	2
Grounds on which the jurisdiction of this court is invoked	2
Questions presented for review	3
Constitutional provisions and statutes involved	3
Statement of the case	3
Reasons for granting the writ and argument amplifying the same	4
I.	
Under the facts petitioner should have been charged and tried for a violation of Section 532 of the Penal Code rather than for a violation of Section 487, Subdivision 1 of the same Code	5
II.	
The petitioner was prejudicially affected by the restrictions placed upon him by the trial court in not being permitted to testify concerning his business career	10
III.	
The petitioner was prejudicially affected by a refusal of the trial court to submit to the jury requested instructions under petitioner's theory of the case	12
Conclusion	13
Appendix A—Opinion of the District Court of Appeal	1
Appendix B—Minutes	14
Appendix C—Appellant's Petition for Hearing Denied	16

TABLE OF AUTHORITIES CITED

Cases	Page
California Drive-In Restaurant Association v. Clark, 22 Cal. 2d 287	9
Douglas v. Alabama, 85 S. Ct.	4
Hammond v. McDonald, 32 Cal. App. 2d 187	9
Malone v. Bosch, 104 Cal. 680	9
Pennie v. Reis, 80 Cal. 266	9
People v. Carter, 131 Cal. App. 177	7
People v. Cooper, 64 Cal. 2d Supp. 946	7
People v. Jackson, 24 Cal. App. 2d 182	7
People v. Kane, 27 Cal. 2d 693	12, 13
People v. Martin, 188 Cal. 281	9
People v. Sands, 102 Cal. 12	9
People v. Selk, 46 Cal. App. 2d 140	7
People v. Walther, 27 Cal. App. 2d 566	7
Schull, In re, 23 Cal. 2d 745	7
Williamson, In re, 43 Cal. 2d 651	7, 8

Rules	
Federal Rules of Criminal Procedure, Rule 37(b)	2
Rules of the Supreme Court of the United States, Rule 19(1)(a)	2

Statutes	Page
California Penal Code, Sec. 484	6, 8, 9
California Penal Code, Sec. 487	1, 8
California Penal Code, Sec. 487(1)	3, 5, 8
California Penal Code, Sec. 532	5, 6, 7, 8, 9
California Penal Code, Sec. 951	7
California Penal Code, Sec. 952	7
United States Code Annotated, Title 28, Sec. 1257 (3)	2
United States Constitution, Fifth Amendment	3
United States Constitution, Fourteenth Amendment	3

IN THE

Supreme Court of the United States

October Term, 1964

No. .....

ERNEST A. HENRIQUES,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California for the Second Appellate District.

Petitioner, Ernest A. Henriques, respectfully prays for a Writ of Certiorari to the District Court of Appeal of the State of California for the Second Appellate District in order to review its judgment affirming a judgment of the Superior Court of the State of California in and for the County of Los Angeles adjudging petitioner guilty of the crime of grand theft contrary to the provisions of Section 487 of the Penal Code of the State of California and sentencing him to be imprisoned in the county jail of Los Angeles County for a period of one year as a condition of probation.

Opinions Below.

The Superior Court delivered no written opinion. The trial was by jury.

The opinion of the court below is unreported in that the justices who wrote the opinion certified that the matter was not of sufficient public concern to be reported and the same was certified for non-publication. A copy of said opinion is appended hereto as Appendix A.

The judgment of the trial court is appended hereto as Appendix B and the judgment below is contained in the last sentence of the opinion appended hereto as Appendix A.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is December 10, 1964.

2. Timely filed petition for hearing in the California Supreme Court after decision in the District Court of Appeal was denied on February 3, 1965 (see Appendix C, attached hereto, which is a copy of the order denying petition for hearing in the California Supreme Court).

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari are Rule 37(b) Federal Rules of Criminal Procedure, Rule 19(1)(a) of this Court and 28 U.S.C.A 1257(3).

Questions Presented for Review.

1. Where there is both a general and a specific statute is it a denial of due process of law and a denial of equal protection of the law to try, charge and convict a defendant under the general statute rather than proceeding against him under the specific statute?

2. Is it a denial of due process of law for a state court to restrict a defendant's testimony unduly where the restricted testimony could and would tend to exculpate the defendant?

3. Is it a denial of due process of law to refuse to instruct a jury in accordance with the defendant's theory of the case?

Constitutional Provisions and Statutes Involved.

The Fifth Amendment of the Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

The basic facts of the case are clearly set forth in the opinion of the District Court of Appeal (see Appx. A). Petitioner was originally charged with a violation of subdivision 1 of Section 487 of the Penal Code in three counts [C. T. 1]. The case was tried by a jury

and petitioner was found guilty on Counts One and Two [C. T. 24-25] and the jury disagreed as to Count Three and proceedings relating to said count were placed off calendar [R. T. 1045].

Petitioner placed advertisements in the Sunday Los Angeles Times under the heading of Business Opportunities indicating that he wanted a partner with $7,500 in capital to join a going business in which there would be a $200.00 weekly drawing account [R. T. 12]. The alleged victims on Counts One and Two testified concerning the representations made by petitioner in connection with their making investments in petitioner's business. There is no question that representations were made and the issue of the truthfulness thereof was determined adversely to petitioner by the jury. The trial judge denied petitioner's motion for new trial [R. T. 1040], thus approving the verdict of the jury.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

The holding of this court in *Douglas v. Alabama,* 85 S. Ct. ...., decided April 5, 1965, is indicative of the rights to which a criminal defendant is entitled under our constitutional system. It is our position that for the reasons hereinafter set forth petitioner in this case was not given the minimum rights to which he was entitled and therefore his conviction flies in the face of his constitutional rights.

I.

Under the Facts Petitioner Should Have Been Charged and Tried for a Violation of Section 532 of the Penal Code Rather Than for a Violation of Section 487, Subdivision 1 of the Same Code.

It is our position that Section 532 of the Penal Code has never been repealed, directly or by implication, and that petitioner should have been charged under said section which provides as follows:

> "§532. False pretenses; obtaining money, labor, or property, punishment. Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real or personal, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained."

Petitioner was charged under subdivision 1 of Section 487 of the Penal Code which provides as follows:

> "§487. Grand theft defined. Grand theft is theft committed in any of the following cases:
>
> 1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); provided, that when domestic fowls, avocados, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty

dollars ($50); provided, further, that where the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, then the same shall constiute grand theft . . ."

The District Court of Appeal held that Section 532 of the Penal Code was repealed by implication by the adoption of Section 484 of the same Code.

Section 484 of the Penal Code provides as follows:

"§484. Theft defined. Every person who shall feloniously steal, take, carry, lead, or drive away the personal property which has been entrusted to him or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or

service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud."

In reaching its decision the District Court of Appeal relied upon:

People v. Jackson, 24 Cal. App. 2d 182;
People v. Selk, 46 Cal. App. 2d 140, and
People v. Carter, 131 Cal. App. 177.

The District Court of Appeal completely ignored the decision of *People v. Walther*, 27 Cal. App. 2d 586, which was a prosecution under Section 532 of the Penal Code. Said decision was subsequent to the 1927 and 1929 amendments to Sections 951 and 952 of the Penal Code.

It is hornbook law that a special statute dealing expressly with a particular subject controls and takes precedence over a general statute governing the same subject.

In re Schull, 23 Cal. 2d 745;
In re Williamson, 43 Cal. 2d 651.

This rule applies even though the special act was passed before or after the general act.

People v. Cooper, 64 Cal. 2d Supp. 946.

The following quotation contained in *In re Williamson, supra,* at page 654, is in our opinion controlling:

> "Section 182 of the Penal Code is a general statute which covers the field of conspiracies. One of its provisions includes a conspiracy to 'commit any crime.' Section 7030 of the Business and Professions Code, however, deals with the specific crime of conspiring to violate certain licensing provisions of that code. When both sections are considered, the latter clearly is a specific enactment which controls the former one."

The real issue involved in this case is whether or not Section 532 of the Penal Code was repealed by implication by the adoption of Sections 484 and 487 of the Penal Code. We submit that the subject covered by Section 532 of the Penal Code refers to specific and definite forms of larceny and that the charge against this petitioner comes within the false and fraudulent misrepresentation definition contained in said section.

A reading of subsidivion 1 of Section 487 of the Penal Code under which petitioner was charged does not define theft by false representations or false pretenses. In order to determine the actual crime charged under subdivision 1 of Section 487 resort must be had to Section 484 of the Penal Code which defines various types of theft. We again assert that Section 532 of the same Code is limited to specific types of theft. We now turn to the problem as to whether Section 532 was impliedly repealed by the adoption of Section 484 of the Penal Code. Repeals by implication are not favored by the law and unless express terms are used

to disclose the intention to repeal, there is a presumption against repeals by implication.

People v. Martin, 188 Cal. 281.

If it is at all possible two laws on the same subject will be so construed as to keep both in effect. In order to overcome the presumption against repeal by implication the two acts must be irreconcilable, clearly repugnant and so inconsistent that they cannot have concurrent operation or the intent to effect a repeal must be otherwise expressed in unmistakable language.

Hammond v. McDonald, 32 Cal. App. 2d 187;

Malone v. Bosch, 104 Cal. 680;

People v. Sands, 102 Cal. 12.

There is nothing inconsistent or repugnant or conflicting as between Sections 484, 487 and 532 of the Penal Code nor is there anything to indicate that there is no possibility of the concurrent operation of the two acts.

California Drive-In Restaurant Association v. Clark, 22 Cal. 2d 287;

Pennie v. Reis, 80 Cal. 266.

Section 532 of the Penal Code was first adopted in 1872 and was amended in 1889 and 1905. Section 484 of the Penal Code was enacted in 1872 and amended on a number of occasions thereafter, the last amendment being in 1935. The Legislature has met many times since the adoption of Section 484 of the Penal Code and it is presumed to know that Section 532 is still a part of the Penal Code.

We submit that the District Court of Appeal erred in holding that Section 532 of the Penal Code was repealed by implication.

II.

The Petitioner Was Prejudicially Affected by the Restrictions Placed Upon Him by the Trial Court in Not Being Permitted to Testify Concerning His Business Career.

A careful examination of the record in this case would leave intelligent minds with this question: Was petitioner operating a bona fide business or was he just maintaining a front or facade for the purpose of obtaining money from various victims through his advertisements in the business opportunity columns of the newspaper?

Counts One and Two of the information related to transactions which occurred in 1960; in order to indicate a pattern the People offered evidence of similar transactions through the witnesses Larimer and Freudiger that occurred in 1958 [R. T. 484 and 623].

Petitioner did not have to take the witness stand at all but he did take the witness stand and it appears to us that he should have been given the widest possible latitude in explaining and testifying concerning his entire business career so that the jury could determine whether he actually had a vitamin business or whether he was using the facade of such a business for the purpose of obtaining funds from alleged victims.

When it became evident that the petitioner was going to testify concerning his business career from 1955 to the date of trial, a discussion occurred in chambers [R. T. 814], at which time it was indicated that objections would be made to any transactions occurring in years other than 1958, 1959 and 1960. The People specifically objected to any evidence relating to any busi-

ness transactions during the years 1956, 1957, 1961 or 1962 [R. T. 814].

Petitioner's counsel aptly stated that the theory of the prosecution was that petitioner had only a facade of a business which was used for the purpose of raising money from outside sources [R. T. 815]. The court sustained the People and limited the testimony to transactions occurring only in the years 1958, 1959 and 1960 [R. T. 816]. The court finally modified its ruling and permitted evidence as to the year 1957 but excluded evidence as to any other year [R. T. 820].

Thereafter petitioner made an offer of proof involving other years [R. T. 820-821-822] and the court stood by the ruling theretofore announced [R. T. 822].

Again, during the direct examination of petitioner an attempt was made to indicate that there were negotiations for the manufacture of some 600,000 vitamins and an attempt was made to introduce documentary evidence as Exhibit M. but the court sustained an objection thereto [R. T. 834].

Again petitioner attempted to testify in his own defense relating to certain merchandise that was actually handled by one of the alleged victims, Mr. Foster, but objections were sustained to this line of questioning [R. T. 855]. In the same manner petitioner attempted to testify to transactions with Mr. Larimer but objections thereto were sustained [R. T. 873].

In view of the directly contradictory evidence concerning the extent and volume of petitioner's business, it would seem that anything having any evidentiary value should have been received and considered by the jury and that the court's limitation on petitioner's direct evidence was prejudicial to him.

The entire theory of the prosecution is set forth by a statement made by the prosecutor at page 903 of the Reporter's Transcript where he stated: "I intend to show it was just a business as a facade again to get in investors."

It is our view that both the trial court and the District Court of Appeal erred and that the limitation on petitioner's testimony denied him the right to a fair trial, in accordance with due process of law and the equal protection of the law. Certainly if the prosecutor adopted the theory that petitioner's vitamin business was a front to inveigle victims to invest therein, petitioner had the right to fully reveal his business career to the jury to offer any evidence which would indicate that he was operating a legitimate business and actually dealt in vitamins and vitamin products. The learned District Court of Appeal glossed over this point without indicating the extent to which petitioner was hampered in his attempt to establish his defense.

III.

The Petitioner Was Prejudicially Affected by a Refusal of the Trial Court to Submit to the Jury Requested Instructions Under Petitioner's Theory of the Case.

The California Supreme Court in *People v. Kane*, 27 Cal. 2d 693, at 701, pointed out that a defendant was entitled to a specific instruction on the doctrine of reasonable doubt and in this connection stated:

> "We are of the view that it may properly be said here, as it was in People v. Wilson (1929), supra, 100 Cal. App. 428, 432, 'It is manifest that a vast difference might exist between an instruc-

> tion by which reasonable doubt would be *defined* [as provided by Pen. Code, §1096a] and one in which might be stated the law with reference to some fact from which the jury would be authorized to form a conclusion as to whether a reasonable doubt of the guilt of the defendant would follow. . . . In other words, without infringing in any manner on the provision of the statute by attempting to further *define* reasonable doubt, a defendant would still have the right to direct attention to the evidence from a consideration of which a reasonable doubt of his guilt might be engendered."

Apparently the District Court of Appeal missed our point in which we urged that the trial court erred in refusing to give requested instructions 1 to 14 [Supplemental C. T. 50-63], all of which were specific instructions relating to the facts of the case dealing with the doctrine of reasonable doubt.

We believe that the doctrine of *People v. Kane, supra,* is applicable to this case.

Conclusion.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

BERT B. RAND,
BERTRAM H. ROSS,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, v. Ernest A. Henriques, Defendant and Appellant, 2d Crim. No. 8602,

Filed Dec. 10, 1964.

Appeal from a judgment of the Superior Court of Los Angeles County. Delbert E. Wong, Judge.

For Appellant: Bertram H. Ross.

For Respondent: Thomas C. Lynch and Stanley Mosk, Attorneys General of the State of California; William E. James, Assistant Attorney General; David M. Rothman, Deputy Attorney General.

This is an appeal from the order denying a motion for a new trial and from the "conviction" in a cause involving two counts of grand theft.

In an information filed in Los Angeles County on February 27, 1962, defendant was charged in count I with unlawfully taking $7,500 from David E. Foster on or about August 19, 1960. In count II he was charged with unlawfully taking $7,500 from Elbert W. Reagan on or about October 9, 1960. It was further charged that defendant previously had been convicted of the crimes of violating the Corporation Act and grand theft, felonies. Defendant pleaded not guilty and admitted a previous conviction. In a jury trial he was found guilty as charged in counts I and II. In a third count of the information, the court declared a mistrial with which count we are not now concerned. Defend-

ant was granted probation for 5 years, the terms of which provided, among other things, that defendant spend the first year in the county jail.

A resume of some of the facts are as follows: Count I. — In August of 1960 Foster saw an advertisement in a local newspaper which indicated that the person advertising wanted a partner in a well-established business, and that an investment of $7,500 was required. Foster wrote a letter directed to a box number as directed in the advertisement, and, thereafter, received a telephone call from a man who identified himself as Henriques. Henriques stated that he had a well-established vitamin business and wanted to talk with Foster. Defendant went to Foster's house and again told him that he had a very well established vitamin business and was looking for someone to go into business with him for expansion purposes; that he had been in business for 6 years, that the business was capitalized at roughtly $50,000, that Foster would get $200 a week as a drawing account and 5% of the gross profit; that Foster would get an invoice on every case of vitamins sold and such invoice would be security for the investment; that Foster was to visit the wholesale houses with defendant until Foster learned the business; that the profits would be tremendous; that the product was ready to go on the market the following Monday and there would be 10 professional salesmen used. Foster next saw defendant at defendant's office at 7801 Sunset Boulevard in Hollywood and at that time Foster asked how the business was going. Foster was told by the defendant that the books were at the bookkeeper's office. Defendant showed Foster some invoices and told Foster he could see the books a little later on.

Needless to say Foster never saw the books. Defendant again told Foster that 10 salesmen were ready to go to work, that the product was ready, and that he was doing a nice business with the wholesale drug companies. Defendant also stated that a television program was ready to go and all that was needed was Foster's money. Approximately 10 days later Foster met defendant and some changes were made in a contract. Defendant stated that no one else was to come into the business except perhaps a Howard Oakes; that if Foster was dissatisfied after 90 days, his money would be returned to him upon receipt of a letter from Foster to that effect. Foster believed and relied upon the statements made to him by defendant. Foster signed an "override agreement" on August 22, 1960, and gave defendant a check for $7,500. The agreement contained a clause with the 90-day provision as above set forth and further provided that Foster's $7,500 investment was to be treated as a lien on the accounts receivable of Hi-Pro Products, the business name under which defendant operated. Foster relied upon the clauses in the agreement. Foster's check was cashed and the money received therefrom was placed in defendant's account in his bank.

Foster began work at Hi-Pro Products at 7801 Sunset Boulevard, and on the first day that he was there defendant told Foster there would not be as many salesmen as he had at first anticipated, that there were problems with labels and difficulties with having the pills produced. At the end of the week Foster received his $200 draw. Foster stayed at Hi-Pro Products until the end of November during which period of time he did practically nothing, and received no copies of any

invoices for sales after the time he went to work. After the first few weeks following Foster's going to work he asked defendant whether they had enough money in the bank and defendant stated that they did. Foster also inquired about the salesmen and defendant stated that they had run an advertisement for such in a local newspaper. Foster indicated that he was dissatisfied with the salesmen who had made their appearance. Foster saw no merchandise leave the office during the entire time he was there. Some of Foster's weekly draw account checks of $200 each were dishonored at the bank but ultimately were made good.

After approximately three weeks at Hi-Pro Products, Foster requested the return of $2,500 of his money, and on October 12, 1960, Foster wrote a letter to the defendant requesting the return of all of his money. Foster never received any of his money from defendant.

Count II: Elbert W. Reagan answered an advertisement in a local newspaper wherein a person was sought to invest $7,500 in a going business with a $200 weekly drawing account. About 4 days later Reagan received a telephone call from defendant who stated he was associated with Hi-Pro Products, a wholesale vitamin and reducing pill business. Defendant told Reagan that Reagan was the man he wanted in the company, that he wanted to expand and Reagan would be the public relations man. A meeting was arranged at 7801 Sunset Boulevard. On the following Wednesday evening they met and defendant showed Reagan invoices from various drug companies, some formulas and sealed boxes of stock materials. Defendant told Reagan that he was to replace a partner who was not concentrating upon

the business, that the business was making all kinds of money, and that he (the defendant) did not like to pay enormous income taxes and would rather spread the money around a little and give others the benefit; that Reagan would get $200 per week as a drawing account to live on and a 3% bonus on all gross sales. Defendant indicated that Reagan would be making about $3,000 per month and would have a nice monthly expense account for the public relations work which he was to perform. On the following Friday evening Reagan and his wife met defendant at the defendant's office on Sunset Boulevard. Defendant told Reagan that the business was capitalized at $50,000 and that he had been offered $80,000 for the business. Reagan asked defendant how much business was being done and defendant stated: "We are doing about $90,000 a month now. . . ." Defendant said that they had earned as high as $120,000 a month, that they had done about $36,000 in the lowest month several months previous thereto. Defendant explained to Reagan that there was not much activity in the office at that time, that he dealt with wholesale houses, that Reagan would organize sales programs in other cities, that the local operation was good and a new product was coming up. An "override contract" was prepared and defendant stated that he wanted $7,500. Reagan said he did not have that much money at that time and defendant answered that he wanted Reagan in the business and would take a "good faith" deposit. Reagan signed the agreement and gave defendant a deposit of $450 by check, dated October 10, 1960. Reagan was to come to work two weeks later and pay the remainder at that time. Reagan then signed a check for $7,050 and postdated it to October 24, 1960.

Reagan believed and relied upon all of the statements of defendant, including the 90-day cancellation clause and the provisions for the return of monies advanced, and, further, that he was to receive copies of all sales invoices.

Defendant also told Reagan that he was a chemist, and had been in business for many years at the Sunset Boulevard location. Further, defendant told Reagan that he was replacing Foster and that Reagan's $7,500 was being used to buy out Foster. On October 16, 1960, Reagan's bank informed him that his postdated check had been put through for collection. Defendant stated that it was a mistake upon the part of the bank. Defendant further stated that he needed the money badly for television programs and Reagan then gave defendant a check dated October 20, 1960, for $7,050.

On October 24, 1960, Reagan went to work for Hi-Pro Products and defendant told Reagan to take off a couple of days, that there was nothing to do at that time. On Friday at the end of the first week defendant asked Reagan if he could take less of a drawing account than the $200 promised becaise things were "bad." Reagan accepted a check for $125. Reagan saw no invoices during the entire time he was there. When Reagan went back on the second Monday to work, defendant told him everything was fine and the business looked good. Reagan continued working at the Sunset Boulevard address for about 10 weeks, but performed few duties. He saw no invoices during his entire time with defendant, and when defendant was asked about it, defendant said that he did not have them with him. When one of defendant's checks was returned as not good, and after Reagan received no drawing account for

several weeks, Reagan asked defendant for a financial statement. During the ninth week, defendant did not appear at the office and Reagan demanded the money owed to him. Reagan never saw the defendant after the ninth week, and the $7,500 paid by Reagan to defendant was never returned to Reagan.

Both Counts: A Los Angeles police officer talked to defendant on October 16, 1961, and asked defendant to name all of the laboratories with which he, defendant, had done business up to that time. Defendant stated that he had his vitamins manufactured by Tecknol, Riders and Neoco Laboratories, and those were the only companies with which he had dealt.

A representative of Neoco Pharmaceutical Company said that it had delivered $607.20 worth of products to defendant between August 25, 1961, and October 11, 1960.

A representative of Tecknol Laboratories stated that it manufactured certain products of the value of $1,500.00 for defendant in November, 1960, and that, at the time of trial, defendant owed $1,281.20 to Tecknol.

W. E. Rider of Rider's Laboratories sold defendant $7,828.02 worth of products between August 16, 1957, and October 1, 1959. Rider took back $1,734.16 worth of the merchandise and defendant owed Rider a balance of $439.60.

Between July 10, 1958, and May 8, 1961, McKesson and Robbins paid Hi-Pro Products Company $1,158.60 for products sold to it by Hi-Pro. McKesson and Robbins did not do business with Hi-Pro in 1960 and they bought products from Hi-Pro on a pay-when-sold basis. The Brunswig Drug Company purchased products

from Hi-Pro on a consignment basis. The Los Angeles Drug Company purchased products from defendant on a pay-on-reorder basis between October, 1959 and December, 1960, purchasing about $2,900 worth of products and paid Hi-Pro Products company $372.97.

An auditor testified that the total amount of deposits in defendant's account in the Bank of America between January 21, 1960 and October 6, 1960 was $7,020.26. The total deposits in the Security First National Bank between August 22, 1960, and December 28, 1960 amounted to $31,290.12. The Foster check for $7,500 was deposited in defendant's Security First National Bank account as were the Reagan checks for $450 and $7,050.

Wayne Larimer and Walter Freudiger both saw advertisements in a local newspaper of September, 1958 and both men responded by letter to the advertisements. Both men responded by letter to the advertisements. Both men were contacted by the defendant and meetings were arranged. Representations similar to those made to Foster and Reagan were made to each of the first above-named persons. As the result of such representations, each of the men paid the defendant $7,500. Larimer put up a second $7,500. Upon requests for termination and return of their money, Freudiger received nothing and Larimer ultimately received $2,026.00 from defendant.

Defendant testified in his own behalf and generally, among other things, testified, in effect, that he had not made the representations attributed to him.

Appellant now asserts that he was charged and convicted of a violation of section 487, subdivision 1, of

the Penal Code, and that, if he was guilty at all, he should have been tried and convicted under the provisions of section 532 of the Penal Code; that the evidence in any event was insufficient to support the conviction; that it was error to admit the evidence showing a common scheme or plan; that the court erred in limiting certain cross-examination; that it was error to limit the defendant's testimony, and that it was error to refuse to give certain of defendant's proposed instructions. There is no merit to any of appellant's contentions.

Appellant first argues that in a case involving false representations, the prosecution must proceed under section 532, Penal Code, i.e., appellant claims that as long as the statute is on the books, it must be used by the district attorney. Here the appellant was charged with a violation of section 487, subdivision 1, of the Penal Code.[1]

Section 484 of the Penal Code defines the crime of theft.[2]

---

[1]"§487 [*Grand theft defined.*] Grand theft is theft committed in any of the following cases:

"1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); provided, that when domestic fowls, avocados, olives, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50); provided, further, that where the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, then the same shall constitute grand theft.

". . ."

[2]"§484. [*Theft defined: Stealing or misappropriation of property; Obtaining money, labor, property or credit by fraud or false report: Determination of value of property or services: Representation or pretense deemed continuing: Charging date of offense: Hiring employee without advising of unpaid labor claim or judgment.*] Every person who shall feloniously steal, take,

People v. Jackson, 24 Cal.App.2d 182, 203, states:

". . . There is no inconsistency between sections 484 and 532 of the Penal Code and the applicable provisions of the former have in effect repealed the identical provisions of the latter."

In *People v. Selk,* 46 Cal. App.2d 140, 146, it is stated:

". . . The offense of theft has been substituted for the former separate offenses of larceny, embezzlement and obtaining money or property by false pretenses."

In *People v. Carter,* 131 Cal.App. 177, 181-182, it is set forth:

"From a consideration of the language employed in section 484 of the Penal Code, as amended in 1927, with the language contained in the formerly existing several statutes by which is denounced the respective

---

carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to repeat falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud."

crimes of larceny, embezzlement and obtaining money or property by false pretense, little, if any, doubt may be seriously entertained regarding the fact that the prime intention of the legislature in enacting the statute of 1927 was to consolidate into a statement of one criminal offense, consisting of each of several complete parts thereafter to be known as theft, the various criminal offenses theretofore known and recognized by the names of larceny, embezzlement and obtaining money or property by false pretense. [Citation.]

"A comparison of the language contained in section 532 with that employed in section 484, as the latter was amended by the statute of 1927, demonstrates the fact that to the extent that section 484 deals with the criminal offense of obtaining money, property or labor by false pretense, the two statutes are nearly identical one with the other. So limited, and considered thus either as an entirety, or in any one of the said several provisions of each of such statutes, no repugnancy nor inconsistency may be discovered to exist between them. The object or purpose of the two statutes is identical one with the other. And to the extent indicated by the sameness or the similarity of language and construction of the two statutes, it would seem incontrovertible that the applicable provisions of section 484 have superseded, or, in effect, repealed the identical provisions of section 532."

With reference to the contentions of insufficiency of the evidence, no useful purpose would be served in repeating the evidence in this case. Suffice it to say that appellant made many false representations to each of his victims, the representations were made with the intent to defraud each of the victims of his particular

property and each of the victims was, in fact, defrauded and did part with $7,500 each in reliance upon the representations of appellant. (See *Perry v. Sup. Ct.*, 57 Cal.2d 276, 282-283; *People v. Moore*, 164 Cal.App. 2d 695, 697; *People v. DeCasaus*, 194 Cal.App.2d 666, 673.)

The testimony of Freudiger and Larimer was properly admitted into evidence to show common scheme, plan or modus operandi. In *People v. Hernandez*, 209 Cal. App.2d 33, 40, it is said: " 'Usually, it is a primary question for the court to determine whether facts pertaining to offenses other than that charged show a general pattern, scheme or plan and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant an inference that if defendant committed the others he committed the one charged, . . .' "

The testimony of the two men involved with appellant in 1958 is very similar to the testimony of Foster and Reagan in the present case, and definitely shows a mode of operation by the appellant in his machinations and bunco dealings.

The cross-examination of certain prosecution witnesses was properly limited under the circumstances. It is asserted, for instance, that Regan did not rely upon appellant's representations because he, Reagan, was investigating a number of other business opportunities at the time he was dealing with appellant. The judge permitted appellant to examine Reagan thoroughly as to Reagan's investigation with reference to Hi-Pro Products and appellant, but the court properly ruled that what Reagan had done with reference to some other business opportunity matter was obviously not relevant

to the case at hand. We find no prejudicial or reversible error in any of the trial court's rulings.

Appellant was properly limited in his testimony with reference to his business activities. A wide latitude was afforded appellant and even if, at sometime or another in the distant past, he was engaged in an honest business, or even if part of the time he was honest in his present business, it does not necessarily follow that he did not do what the evidence overwhelmingly shows that he did do in the case at hand.

There was no limitation whatsoever upon appellant's testimony with reference to the truth or falsity of any representation made to the present victims.

There was no confusion in this case about the instructions. Grand theft was the only charge which was made against the defendant and the jury was fully and properly instructed upon the principles of reasonable doubt. Appellant relies heavily upon the case of *People v. Kane,* 27 Cal.2d 693, a reading of which will indicate that the problems there were not present in the case at bench.

The attempted appeal from the non-appealable order denying the motion for a new trial is dismissed.

The judgment is affirmed.

Fourt, *J.*

We concur:

Wood, *P.J.*

Lillie, *J.*

Certified for non-publication in Official Reports under Rule 976.

Wood, *P.J.*

Fourt, *J.*

Lillie, *J.*

APPENDIX B.

Minutes.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Department No. 112, July 19, 1962, Present Hon. Delbert E. Wong, Judge.

The People of the State of California, vs. Ernest A. Henriques. 254858.

Defendant with counsel, S Winston, present. Defendant's motion for a new trial denied. Counts 1 and 2, CONCURRENT: Proceedings suspended.

X Spend first year in County Jail. X Road Camp or Honor Farm Recommended. X Good time allowed if earned.

Pay fine of $..... through Probation Officer in such manner as such officer shall prescribe .....

.....

X Make restitution through Probation Officer in such amounts and manner as such officer shall prescribe.

X Pay any judgment arising out of this matter, when it becomes final in such amounts and manner as Probation Officer shall prescribe.

Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale.

Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.

Not associate with known narcotics users or sellers.

Have no blank checks in possession, not write any portion of any checks, not have bank account upon which may draw checks.

Not gamble or engage in any bookmaking activities or have paraphernalia thereof in possession, and not be present in places where gambling or bookmaking is conducted.

Not associate with .....

Stay out of places where homosexuals congregate.

Not associate with children under 14 years except in presence of responsible adults.

Cooperate with Probation Officer in plan for psychiatric, psychological or other treatment.

X Seek and maintain employment as approved by Probation Officer, not engage in any business without approval of Probation Officer.

Support dependents.

Maintain residence as approved by Probation Officer.

Surrender drivers license to Clerk of Court to be returned to Department of Motor Vehicles, and not drive a motor vehicle for the first year after release from custody nor until lawfully licensed.

X Obey all laws, orders, rules and regulations of Probation Department and of the Court.

Count 3 off calendar. Time waived. Defendant granted stay of execution until July 30, 1962. Defendant to report at 9 A M on that date.

APPENDIX C.

Order due February 8, 1965.

Order Denying Hearing, after Judgment by District Court of Appeal, 2nd District, Division 1, Crim. No. 8602.

In the Supreme Court of the State of California, in Bank.

People v. Henriques.

Mosk, J., did not participate.

Appellant's petition for hearing Denied.

Filed Feb. 3, 1965.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 23rd day of April A.D. 1965.

William I. Sullivan
By R. Johnson
Deputy Clerk.